UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

NEW ALBERTSON'S INC.,

Employer,

and

Case Nos. 27-RD-1212
27-RD-1213

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 7

Union,

and

DAVID A. FRANKE,

Petitioner.

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION WITH RECOMMENDATIONS TO THE BOARD[1]

Pursuant to Stipulated Election Agreements in Case 27-RD-1212 and Case 27-RD-1213, approved by the Regional Director on May 19, 2008, elections by secret ballot were conducted in the break room at the Employer's Rock Springs, Wyoming facility on June 11, 2008 in each of the following units:[2]

[1] Under the provisions of Section 102.69(i)(2) and 102.69(f) of the Board's Rules and Regulations the parties may file exceptions to this report with the Board in Washington, D.C. Exceptions must be filed within 14 days of the issuance of this report and an original and eight copies must be served upon the Board and copies must be immediately served on all other parties and upon the Regional Director, Region 19. In the absence of exceptions recommendations in this report may be adopted by the Board.

[2] The elections for both units were conducted simultaneously in the Break Room of the Employer's facility at 1323 Dewar Drive, Rock Springs, Wyoming.

Case 27-RD-1212:

> Included: All Service Deli Clerks employed by the Employer in the Service Deli Department of its supermarket located at 1323 Dewar Drive, Rock Springs, Wyoming, who were employed during the payroll period ending Saturday May, 10, 2008.
>
> Excluded: All other employees, all office clerical employees, confidential and professional employees, guards, watchmen, the Service Deli Manager, the Store Director, Assistant Store Director, and all other supervisors as defined in the Act.

Case 27-RD-1213:

> Included: All food clerks, liquor managers, courtesy clerks, floral clerks, customer service center clerks, bakery sales clerks, head bakery sales hostess, non-food clerks, the floral employee hired before 1999, the general merchandise manager, and the lobby manager employed by the Employer at its retail grocery store at 1323 Dewar Drive, Rock Springs, Wyoming, who were employed during the payroll period ending Saturday May, 10, 2008.
>
> Excluded: All employees covered by another collective bargaining agreement (such as bakery production employees, meat employees, butcher block employees, and service deli employees), office clerical employees (such as bookkeepers), scan coordinators, salad bar employees, product demonstrators, professional employees, confidential employees, janitors, guards, Store Director, Assistant Store Director, Front End Manager, Third Person, Produce Manager, and supervisors as defined in the Act.

Upon conclusion of the elections, a Tally of Ballots in each case was prepared. In Case 27-RD-1212, of approximately 4 eligible voters, 2 voted in favor of the Union and 0 voted against the Union. There were no void or challenged ballots. In Case 27-RD-1213, of approximately 48 eligible voters, 18 voted in favor of the Union and 15 voted against the Union. There were no void ballots and there were two challenged ballots, which were not sufficient to affect the results of the election. Thereafter, on June 17, 2008, [3] the Employer filed identical timely objections to conduct affecting the

[3] Hereafter all dates refer to 2008.

results of each election and a copy of each set of objections was served on the Union. A copy of the objections in Case 27-RD-1212 is attached to this report as Attachment A. A copy of the objections in Case 27-RD-1213 is attached as Attachment B.

On July 7, 2008, after an investigation conducted pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director issued and served on the parties a Report on Objections, Order Consolidating Cases and Notice of Hearing ("Report") in which he found that the allegations raised by the Employer's objections raised substantial and material issues of fact and credibility which could best be resolved by a hearing. He therefore ordered that a hearing be held before a Hearing Officer for the purpose of taking evidence on the issues raised by Employer's Objections 1 through 3 and that the designated Hearing Officer should, after conducting such a hearing, prepare a report to be served upon the parties containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objections.

Pursuant to the Order of the Regional Director, a hearing was held on July 22 and 23, 2008 in Rock Springs, Wyoming, before the undersigned Hearing Officer. All parties to the proceeding were afforded full opportunity to be heard, to present testimony, to call, examine and cross-examine witnesses, and to otherwise introduce evidence which was relevant to the issues involved herein. The Hearing Officer granted leave to file post-hearing briefs.

Upon the entire record herein, and from my observation of the witnesses and after having read the parties post-hearing briefs, the undersigned makes the following findings of fact, conclusions and recommendations:

Objection One

> The Union, through its agents, threatened and coerced employees in order to influence their votes in the election.

The Regional Director's Order Directing Hearing on Employer's Objections to Election, Order Consolidating Cases and Notice of Hearing stated that his investigation revealed that the Employer was contending that the Union interfered with the election when Union Steward Rosalie Georgis told at least two employees that employees would lose their jobs, have their hours cut and lose their benefits if the Union were decertified.

Findings

The Employer presented evidence of statements made by steward Rosalie Georgis, as well

The evidence clearly establishes, and Rosalie Georgis admits, to speaking to various employees prior to the election about the advantages of keeping the union and the disadvantages of voting it out. The Employer cites four instances it characterizes as Ms. Georgis threatening or coercing employees in order to influence their votes. The testimony is consistent that Ms. Georgis relayed to two employees in the clerks bargaining unit (27-RD-1212) what she had heard about another grocery store voting out their union, where workers lost their jobs or became part time. (Tr. 118-19; 139; 157-58; 161-62). One employee, Stephanie Smith, provided credible unrebutted testimony that Ms. Georgis said that if the union was voted out that everybody would lose their jobs. (Tr. 202). Lastly, Ms. Georgis told employees that they needed the Union to protect their jobs. (Tr. 95; 100; 139).

Conclusion

Union Steward Rosalie Georgis made statements to employees regarding potential job loss if the union were voted out, and the need for the union to remain in the store in order to protect employees' jobs. Further, I find that Union Steward Georgis was, at all relevant times, acting as an agent of the Union. Based on the totality of the relevant circumstances, I conclude that Georgis' statements to employees were innocuous statements of opinion and were not threatening or coercive.

Under the standard used in evaluating conduct of parties, conduct is objectionable if it would reasonably tend to interfere with the employees' free and uncoerced choice in the election. Baja's Place, 268 NLRB 868 (1984). The Board has held that threats of job loss or discharge made by union representatives are considered to be noncoercive since employees can reasonably evaluate such comments as being beyond the union's control, and are, at most, a prediction of action to be taken by the employer. Bonanza Aluminum Corp., 300 NLRB 584 (1990); Pacific Grain Products, 309 NLRB 690, 691 (1992); Janier Plastic Mold Corp., 186 NLRB 540 (1970); Duralam, Inc., 284 NLRB 1419 fn. 2 (1987). Here, the Employer has not alleged nor offered evidence that Georgis or the Union had any control over Stephanie Smith's, or any other employees' job security. Thus, Smith could not reasonably believe that Georgis or the Union had the ability to carry out the alleged threat. Pacific Grain Products, *supra.*

Accordingly, I recommend that Objection One be overruled.

Objection Two

The Union, through its agents, provided various incentives to employees and their families in order to influence their vote in the election.

The Regional Director's Order Directing Hearing on Employer's Objections to Election, Order Consolidating Cases and Notice of Hearing stated that his investigation revealed that the Employer was contending that the Union interfered with the election when the Union provided dinner at Fiesta Guadalajara, a local restaurant, for bargaining unit employees and their families, and campaigned during the event. Further, the Employer contends that the Union paid for the entire event, including food and drink and entertainment, and that such an event constituted an impermissible grant of benefit or gift.

Findings

It is undisputed that the Union hosted a dinner for bargaining unit members and their families at Fiesta Guadalajara, on Monday June 9th. (Er. Ex. #6). In attendance were approximately 40 to 50 people, including employees and family members. (Tr. 66; 169). The evidence showed that all employees, regardless of their support for the Union, were invited to attend, and no one was required or asked to give anything in exchange for the dinner. The focus of the dinner was to encourage employees to vote and to answer questions. (Tr. 175). Benefits were not discussed at the dinner, but there was mention of whether the store would be safe if the union were not there to back up employees. (Tr, 175; 66). The conversation about the election itself lasted about five minutes. (Tr. 167). The bill for the dinner was $532.30. Including tip, the total cost was $647.30.

Conclusion

The Board has long held that a union or employer providing food and drink during organizational campaigns is within the realm of permissible conduct. Lamar Company, LLC, 340 NLRB 979 (2003); Chicagoland Television News, Inc., 328 NLRB 367 (1999); Fashion Fair, Inc., 157 NLRB 1645 (1966). In Lamar Company, the Union spent $815 (including a $200 tip) on dinner for seven employees and their significant others, as well as the Union representative and his wife; a total of about 16 people. The per person cost of this outing was about $50. In this case, the testimony was that there were approximately 40 to 50 attendees; making the per person cost range from a low of $13 to a high of $16. This is well below the amount that the Board found permissible in Lamar Company.

Accordingly, I recommend that Objection Two be overruled.

Objection Three

> During the voting period, the Union maintained on its bulletin board located in the employee break room where the voting took place, a posting that included the following statement:
>
> > United Steel Workers of Southwest Wyoming Locals 12214 and 15320 Support the members and families of Local 7 Food and Commercial Workers at Albertson's. We hope the employees at Albertson's will support Local 7 so that we can continue to Shop at a Union Store. VOTE TO STAY UNION.

The Regional Director's Order Directing Hearing on Employer's Objections to Election, Order Consolidating Cases and Notice of Hearing stated that his investigation revealed that the Employer contends the above-quoted flyer was posted in the polling area during the election and that at some point the Union had refused to remove the

flyer. The Employer asserts that the flyer contains an objectionable threat to boycott the Employer, which could affect the livelihood of bargaining unit employees, and also constitutes impermissible electioneering in the polling area.

Findings

This "flyer" was actually a newspaper advertisement that appeared the day prior to the vote on Tuesday June 8th, in the "Rocket Miner", the daily Rock Springs, Wyoming newspaper. That same day, the union posted the flyer on the union bulletin board. The Employer alleges, and testimony was presented that some employees found the flyer to be "offensive" and a "threat". (Tr. 56).

In support of its objection to the flyer, the Employer cites Superior Wood Products, 145 NLRB 782 (1964). In that case, a union representative told voters two days before the election, that if they did not vote for the union, the union might cause the employer's largest customer (buying 96% of the employer's production, employees of which were also represented by the union), to refuse to handle the employer's products. Superior Wood is distinguishable. There, the union representative made a direct threat of loss of business that the union had the ability to carry out, in order to influence the voters. Here, the flyer merely contains language which would encourage employees to vote for the Union, so that the Steelworkers union members can "continue to shop in a union store." No strained reading of the flyer supports the contention that a union loss in the election will result in the Steelworkers union boycotting the Albertson's store; it merely expresses a preference for shopping at a union store.[4]

[4] I further note that employee Christy Branum, who testified that she found the flyer threatening, conceded that the Rock Springs Albertson's is the only Union grocery store in the city, so even if the Steelworkers Union members wanted to shop at another store in the city, it would have to be a non-union store. (Tr. 59-60).

Furthermore, the Board applies an objective test when evaluating alleged objectionable conduct and "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." Picoma Industries, 296 NLRB 498, 499 (1989), quoting Emerson Electric Co., 247 NLRB 1365, 1370 (1980), enf'd. 649 F.2d 589 (8th Cir. 1981). Thus, while employee Christy Branum testified that she felt the flyer was a "threat", the determination as to whether there was a threat is an objective one. Branum further testified that the Employer is the only Unionized grocery store in Rock Springs, making it clear that the Steelworkers Union flyer was not suggesting that if the employees chose to vote out the Union, that the Steelworkers would shop at another unionized store. I therefore find that the notice is not coercive and does not constitute objectionable conduct.

Employee Christy Branum testified that she felt the flyer was offensive and asked company representative Jose Rosario why it was on the bulletin board. (Tr. 56). Rosario told Branum that she could take it down, which she did. Rosario was then approached by Union Representative Randy Rawlings, who said that by contract, the Union can have such notices posted. Rawlings testified that Rosario came back later and told Rawlings that he had called corporate and that the Union could post the flyer. (Tr. 183). Rosario said "that [the flyer] may be an issue tomorrow" to which Rawlings replied "Well, if it is, then you can raise it with the Hearing Officer."[5] (Tr. 183).

The testimony is undisputed that the flyer was posted during the election, on the union bulletin board, located to the right of the voting booth, located in the employer's break room. During the voting period, the voters would have to check in with the Board

[5] In this context, I find that the witness was referring to the Board Agent running the election.

Agent and observers, and then proceeded to the voting booth, where they would come face to face with the bulletin board, prior to turning 180 degrees to the left, putting them "in" the voting booth with the notice over their left shoulder. (Er. Ex. 3, Tr. 42-44). Further, undisputed testimony establishes that at the pre-election conference, no one – not the Employer's observer, not even the Employer's Representative Jose Rosario – raised the issue of the notice posting with the Board Agent.[6]

The Employer presented Glenda Ray Davis Smith, a checker at the store and the Employer's observer at the election. In response to questions from the undersigned, she testified:

> Hearing Officer Saveland: Did anybody at any time take note of what's marked as Employer's Exhibit 2 during the pre-election conference?
> Witness Davis Smith: No, sir.
> Hearing Officer Saveland: And nobody brought it to the attention of the Union rep? Or the Employer rep? Or the Board agent that was on the scene?
> Witness Davis Smith: No,… (Tr.44)

Union representative Randy Rawlings testified, in response to questions from Employer's counsel:

> Ms. Balmforth: Nobody talked to you about taking it [the flyer] down?
> Witness Rawlings: No, and I had a conversation on the Tuesday prior when this came out. We posted it. Actually, I think Trish posted it. It came down. I found out about it. I reposted. Jose – I went to him. I said, Jose. And I showed him the contract where we can have things posted. He called corporate. And he came back, and he said, You can put it up there. And he said that may be an issue tomorrow. And I said, Well, if it is, you can raise it with the Hearing Officer. And that was the last we heard about it. (Tr. 183)

[6] Further, no testimony was given that any objection was made to the posted flyer during the voting period, or during

In response to questions from the Hearing Officer:

Hearing Officer Saveland: When [sic] the day of the election, were you in the voting room during the pre-election conference?
Witness Rawlings: Yes, I was.
Hearing Officer Saveland: Was any comment made about that posting at that time? I mean your previous testimony was to Jose that you told Jose that he could bring it up on voting day. So did anybody make a comment about that posting?
Witness Rawlings: None. None that I heard. (Tr. 186)

Upon further questioning from Employer's counsel:

Ms. Bamforth: Was Jose there? Was Jose there during the pre-election meeting?
Witness Rawlings: Oh, yes. Yes, we discussed other issues. But the bulletin board was never – never brought up and just posting. [sic] (Tr. 186).

Conclusion

The Employer did not present Jose Rosario, the Employer's Representative during the pre-election conference to testify, nor has it offered any reason for the failure to raise the issue at the pre-election conference. The testimony is therefore uncontroverted that the issue was never raised at the pre-election conference, even though Glenda Ray Davis Smith, the employer's observer, and the company representative, Jose Rosario were previously aware of the notice being posted in the voting location.

The Employer cites Pearson Education, 336 NLRB 979 (2001) to support is objection. In Pearson Education, the Board found objectionable a posting where the employer posted, in the hallway immediately outside the voting area, a 2 foot by 3 foot poster depicting a list of strikes in which the petitioning union had engaged in over the last several years. And, while the Board agent did not prohibit the posting of material at

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the ballot count.

or near the polls, the union representative, prior to the voting, told employer's counsel that he objected to the posting. The employer's counsel refused to take it down, and told the union representative to file an objection, which he did.

Pearson Education is distinguishable. Here, the newspaper advertisement was about 8 inches square – far smaller than 2 feet by 3 feet; was put up by the Union, but ultimately with the permission of the Employer, and it was not objected to by the Employer representative on election day, despite the Union representative's suggestion that it be raised with the Board agent running the election. Further, unlike in Pearson Education where the poster had a list of strikes the petitioning union had engaged in, which had been the topic of the employer's speeches, the flyer here is merely an encouragement by another union to vote to support the UFCW, with no implied or explicit threat contained therein. Finally, since the union bulletin board was on the Employer's property, the Employer could have insisted upon its removal on election day, which it failed to do. The Employer's representative, Jose Rosario, having full knowledge of the Union's posting in the voting area, could have, but did not, raise the issue of the posting of the notice prior to the opening of the polls. As a result, I find that the Employer is estopped from raising the objection post-election, since the Employer acquiesced to having the union notice remain posted during the voting period.

The Board has determined that a party has an obligation to raise issues concerning the use of a supervisor as an observer, prior to the election, and the objecting party may not raise the issue for the first time in its post-election objections. *See* Liquid Transporters, Inc., 336 NLRB 420 (2001); Monarch Building Supply, 276 NLRB 116 (1985); Mid-Continent Spring Co. of Kentucky, 273 NLRB 884, 887 (1984);

and Howard Cooper Corp., 121 NLRB 950 (1958); Westinghouse Electric Corp., 118 NLRB 1625, 1626 (1957) Northrop Aircraft, Inc., 106 NLRB 23, 26 (1953)

The same result should apply here. While electioneering "at or near the polls" *may* be considered objectionable conduct, it must be considered in context. Boston Insulated Wire & Cable, Co. 259 NLRB 1118 (1982). The Board considers the nature and extent of the electioneering, whether it occurred within a designated "no electioneering" area, whether it occurred contrary to the instructions of the Board agent, whether a party or nonparty to the election engaged in it, and whether a party to the election objected to it. *See, e.g.* Del Rey Tortilleria, Inc., 272 NLRB 1106, 1107-1108 (1984), enf'd 823 F.2d 1135 (7th Cir. 1987); Boston Insulated Wire & Cable, Co., *supra,* enf'd 703 F.2d 876 (5th Cir. 1983).

Applying the foregoing factors to the Union's flyer, I find the posting not objectionable. Here, the "nature and extent" of the alleged electioneering is one instance of a pro-union notice posting. It is undisputed that the pro-union flyer remained posted during the voting and near the voting booth, which would be considered part of the area "at or near the polls" and is therefore part of the no-electioneering area. It was posted by representatives of the Union prior the election, but with acquiescence of the Company. It was not posted contrary to the instructions of the Board agent, because no one raised this issue with the Board agent, and there is nothing in the record to suggest that the Board agent was even aware of the flyer's posting. No evidence was presented that any employee made comments about the flyer during the election, or noticed it during the voting. It is undisputed that the Employer's representative, Jose Rosario, was present at the pre-election conference, had full knowledge of the posting of the

flyer, and even indicated to the Union representative on the day prior, that the posting of the flyer "may be an issue" at the election. Rosario failed to raise the issue with the Board Agent, and the Employer did not present Rosario to testify to offer an explanation.

In view of the Employer representative's failure to object to the posting at a time when the Board agent possibly could have remedied any problem, the Employer may not complain about it now. *See, e.g.* NLRB v. Del Ray Tortilleria, Inc., 823 F.2d 1135, 1141 n.2 (7th Cir. 1987) (Board, in declining to find a violation of electioneering rules, appropriately relied on company counsel's failure to complain to Board agent about electioneering, despite explicit language in the Board's notice of election that violations of election rules "should be reported immediately to the Regional Director or the agent in charge of the election."); Boston Insulated Wire & Cable Systems, Inc. v. NLRB, 703 F.2d 876, 881-82 (5th Cir. 1983) (declining to deem electioneering impermissible where employer never complained about it to Board agent during election, when the agent might have been able to stop it).

Were this objection to be sustained, it could encourage a party to be aware of, and acquiesce in, potentially objectionable conduct, and then use this conduct as the basis to set aside an election. For these reasons, I recommend that Objection Three be overruled.

OTHER UNALLEGED CONDUCT

At the hearing, the Employer sought to introduce, along with evidence of the conduct of Union Steward Georgis, the conduct of a Union Representative known only as “Steve”, alleging that his conduct also interfered with the conduct of the election. Upon objection by the Union to the introduction of this testimony, the undersigned excluded any testimony relating to Union Representative “Steve” from consideration, since evidence regarding this specific allegation was not provided to the Regional Director in support of the timely filed objections. The Store Director, Robert Wolf, testified, (Tr. 125-26) that he was present for a conversation with a store employee and Union Representative “Steve”, and that he relayed this conversation to a member of upper management named “Jose”. (Tr. 128-29)

The NLRB Casehandling Manual, Part Two, Representation Proceedings, §11392.11 direction on this point is clear – that the objecting party, here the Employer, can only amend their objections if it provides clear and convincing proof that the evidence is not only newly discovered but also previously unavailable. *Citing* Rhone-Poulenc, Inc. 271 NLRB 1008 (1984); Burns Security Services, 256 NLRB 959 (1981); John W. Galbraith & Co., 288 NLRB 876 (1988). The Board in Burns Security stated:

> The objecting party may bring to the Regional Director's attention any newly-discovered evidence that bears directly on the timely objections, for such evidence is more apt to aid than to encumber him. The interest in insuring the employees were not coerced also warrants the Regional Director's consideration of unrelated misconduct, unknown to the objecting party at the time the objections were filed, the existence of which comes to its attention while the Regional Director is conducting his investigation. However, since consideration of such matters might enlarge the scope and delay the conclusion of the investigation, they normally should be considered only upon presentation of clear and convincing proof that they are not only newly discovered, but also, previously unavailable. We deem this limitation necessary in order to discourage both the piecemeal

> submission of evidence and the leisurely continuation of private investigations while the investigation should be under the control of the Regional Director. (footnote omitted) 256 NLRB at 960.

The testimony elicited by Employer's counsel from the Robert Wolf, Store Director, shows that he had knowledge of these conversations with "Steve" about one month prior to the June election (Tr. 125-26), and referred the substance of the conversation it to company representative José Rosario (Tr. 128). While this information was perhaps not referred to Employer's counsel, it was within the knowledge of the Employer, and for that reason, does not meet the newly discovered and previously unavailable standard and must be excluded from consideration. Burns Security Services, *supra*. Moreover, the undersigned Hearing Officer does not have the authority to expand the scope of the objections. *See* Iowa Lamb Corp. *supra.*

In addition to the allegedly coercive statements made by Steward Rosalie Georgis, the Employer presented testimony about an alleged plan by Ms. Georgis to prevent a coworker from taking a weekend off of work. The evidence regarding the alleged plan by Georgis to prevent another employee from taking a weekend off was not properly raised in the evidence in support of objections filed with the Regional Director, and as such, will not be considered.[7] *See* Iowa Lamb Corp., 275 NLRB 185 (1985) (statement relied on by the hearing officer as objectionable was not identified by the

[7] For purposes of review, employee Stephanie Smith testified that Georgis tried to interfere with one of Smith's time-off requests. (Tr. 204). Smith noticed that, after Georgis found out that Smith was taking the weekend of June 7-8 off, more employees with greater seniority wanted to take that same weekend off. Smith testified that Georgis told her that Smith should not be entitled to take the time off; that it should be reserved for employees with more seniority. (Tr. 204). Smith provided uncontested testimony that any attempt by Georgis to interfere with Smith's vacation was ineffective however, since everyone who requested time off that weekend, Smith included, was awarded the time off. (Tr. 206). The evidence did not establish that Georgis took any steps to interfere with Smith's vacation, or that Georgis' purported conduct was linked in any way to the election. Were I to consider this objection, I would recommend that it be overruled.

Regional Director as an issue, the hearing officer did not inform the parties he would consider it, and it was "wholly unrelated" to the issues set for hearing.)

The Employer also presented testimony about the actions of union steward Patricia Musich. The Employer did not present any evidence related to Ms. Musich's alleged conduct to the Regional Director at the time objections were filed, and as such, it was not addressed in the Regional Director's Report. As such, the testimony relating to Ms. Musich goes beyond the proper scope of the objections hearing, and will not be considered. *See,* Iowa Lamb Corp., *supra.*[8]

Recommendation

Accordingly, upon the foregoing findings of fact and conclusions, and upon the entire record herein, it is recommended that the Employer's Objections One through Three be overruled, and that the Board issue a certification of representative in this matter.

[8] For purposes of review, the Employer alleges that Union Steward Musich tried to persuade employee Cameo Sorenson by "shadowing" her on the day of the election, and told Sorenson that the union would protect her and that the store would be unsafe without the union. The undisputed evidence is that Musich told Sorenson that the Union would protect her, and the store "would be unsafe" without the union there, but never threatened that Sorenson would lose her job. (Tr. 63). Sorenson testified that, on June 11th – the day of the election – she was speaking to other employees who were apparently anti-union, and Musich, who was acting as her supervisor, came over and told her to get back to work. (Tr. 64). Later in the day, Musich came over and sat next to Sorenson while she was making signs. (Tr. 65). Sorenson admitted however, that there was nothing unusual about Musich sitting next to her while she was working, since the two work side by side, and that Musich does have a tendency to try to avoid working into overtime. (Tr. 71; 190). Musich's comment to Sorenson that the store would be unsafe without the union, even if one were to interpret this as a prediction of job loss, cannot amount to objectionable conduct, since employees can reasonably evaluate such comments as being beyond the union's control, and are, at most, a prediction of action to be taken by the employer. Bonanza Aluminum Corp., 300 NLRB 584 (1990); Pacific Grain Products, 309 NLRB 690, 691 (1992); Janier Plastic Mold Corp., 186 NLRB 540 (1970); Duralam, Inc., 284 NLRB 1419 fn. 2 (1987). Finally, the one isolated incident of Musich telling Sorenson to get back to work cannot be considered, in itself, coercive, regardless of whether Musich was acting that day as an agent of the Union or the Employer. While the Employer might characterize this as Musich "shadowing" Sorenson, this is without factual support. The undisputed evidence shows that that these two employees work along side one another on a daily basis, so that it was not uncommon that Musich and Sorenson would be working in the same location doing the same tasks. If the conduct related to Musich were to be considered as an objection, I would recommend that the objection be overruled.

Dated at Denver, Colorado this 22nd day of August 2008.

/s/ Todd D. Saveland, Hearing Officer

Todd D. Saveland, Hearing Officer
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